In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 968

STATE OF NEW YORK, APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court sustaining an order of the Interstate Commerce Commission which authorized reductions in rail rates on grain and grain products from Pittsburgh, Pennsylvania to points in the East. *Grain, Pittsburgh, Pa., to Eastern Base Points*, 322 I.C.C. 218, reconsidered, 325 I.C.C. 669.

246-467—67

The City of Pittsburgh, Pennsylvania, is attempting to spur its slowing economy by attracting new industries, including flour milling. With cheap water rates on grain and grain products over the Great Lakes and favorable rail rates beyond, the City of Buffalo, New York, has become the flour milling center of the United States. A rapidly growing western miller, Bay State Milling Company, which is expanding its market in the North Atlantic region, considered locating a mill at Pittsburgh to serve customers in trunkline and New England territories. Because there are already six competing mills at Buffalo and none in Pittsburgh, and because it already has a substantial market in western Pennsylvania but none in upper New York; it preferred to locate at Pittsburgh, which has offered to supply land, and build necessary docks. But rail rates from Pittsburgh were higher than rates from Buffalo; it was not economically feasible to locate at Pittsburgh unless they were lowered. In consequence Bay State and Pittsburgh interests requested the rail carriers[1] to establish rates that would make Pittsburgh more competitive with Buffalo. Although the carriers declined to make the full reductions sought, they did reduce their rates to levels generally only slightly above the rates from Buffalo.[2]

---

[1] The principal carriers are the Baltimore and Ohio Railroad Company, the New York Central Railroad Company, the Pennsylvania Railroad Company, and the Pittsburgh and Lake Erie Railroad Company.

[2] In two instances in which the destinations were considerably closer to Pittsburgh than Buffalo, the rates were lower than the rates from Buffalo.

The State of New York and various Buffalo interests[3] protested the reduction. The Commission found (1) that except as to two New England destinations, the reduced rates were compensatory, in that they covered out of pocket costs plus a return on investment; (2) that the railroads will maximize their net revenue if Bay State locates at Pittsburgh instead of Buffalo; and (3) that reductions to make Pittsburgh competitive would not unduly disrupt the existing rate structure or unreasonably prejudice Buffalo interests. It approved the rates as just and reasonable and ordered the non-compensatory New England rates cancelled. 325 I.C.C. 669.[4] A three-judge district court unanimously sustained the Commission's determination.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court.

The principal issue presented is whether the district court erred in failing to find that the Commission's determination is not supported by substantial evidence. The opinion for the court by Circuit Judge Friendly demonstrates that it fully considered appellant's contentions and that it properly found substantial evidence supporting the Commission's determination.

---

[3] The County of Erie, the City of Buffalo, and the Buffalo Industrial Progress Company. Only the State of New York has appealed.

[4] Originally, Division 2 of the Commission approved the rates (322 I.C.C. 218); on reconsideration, the full Commission considered the case. Two Commissioners would also have approved the New England rates. 325 ICC 669, 681.

Appellant's claim is that the Commission and the district court failed to give adequate consideration to "the essential question of whether the carriers proposing the reduced rates would be better off from a net-revenue standpoint with the reduced rates than without them" (J.S. 8). But this is precisely the question which the Commission considered. Thus, in estimating whether the rates here were likely to improve the carriers' revenue position, it found a reasonable basis for the proponents' estimates, after noting the fact that no grain or grain products moved from Pittsburgh under the old rate structure, after considering the parties' estimates and comparisons of existing and projected inbound movements of grain and flour and projected outbound movements of grain products, after comparing the Buffalo rates with the existing Pittsburgh rates, and after analyzing appellant's contention—which it found to be speculative—that rail movements of flour milled at Pittsburgh would replace more remunerative movements of flour shipped to Pittsburgh from unspecified origins. 325 I.C.C. 672, 678-679. That Buffalo interests, threatened with Pittsburgh competition, might reach a different conclusion is hardly surprising. But it is to the informed judgment of the Commission that Congress has committed such predictions. *Board of Trade* v. *United States*, 314 U.S. 534, 547.

Contrary to appellant's contention, the district court carefully considered and analyzed appellant's effort to overcome "the combined judgment of the

railroads and the 'tribunal appointed by law and informed by experience', *Illinois Central R.R.* v. *I.C.C.*, 206 U.S. 441, 454," as to the future impact of the reduced rates on the revenues of the carriers. Noting the imperfections of both sides' predictions, it carefully analyzed appellant's principal arguments (J.S. A–7–8).[5] In the light of this analysis, it properly concluded that "the Commission had substantial basis for finding the claim of adverse effect on net revenues to be too speculative to warrant disapproval of rates necessary for the movement of traffic, exceeding out-of-pocket costs, and having no harmful effect on any competing carrier." (J.S. A–8) There is no occasion for further review.

---

[5] It held (J.S. A–8): "One need hardly go beyond the initial illogic of arguing that the railroads will fare better under the depressed ex-lake rates from Buffalo than with the higher rates proposed from Pittsburgh although, for most destinations, the latter yield considerably higher ratios to out-of-pocket cost. See 322 I.C.C. at 237, 242, Apps. B and D. Since most of the grain milled at Buffalo arrives there by water, all the dire effects predicted from the Pittsburgh rates would thus occur in even greater measure if the Buffalo mills succeeded in displacing an equivalent amount of midwestern flour. Still more adverse consequences would ensue for the railroads if failure to develop a milling industry at Pittsburgh should result in the growth of mills in the large seaport markets to which grain can move by all-water routes. Finally, the new Pittsburgh rates to many destinations show a more favorable ratio to out-of-pocket costs than the proportional rates on which flour moves from Chicago and St. Louis, although, of course, for a shorter haul. See 322 I.C.C. at 237, 243–44, Apps. B and D."

CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
LAWRENCE G. MEYER,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
LEONARD S. GOODMAN,
Assistant General Counsel,
Interstate Commerce Commission.

FEBRUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967